Supreme Court, U.S.
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No. 08-360

IN THE

Supreme Court of the United States

RICARDO DELGADO,

Petitioner,

v.

CERTIFIED GROCERS MIDWEST,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR REHEARING

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REASONS TO GRANT DELGADO'S PETITION FOR RECONSIDERATION

Ricardo Delgado ("Delgado") brings this Petition pursuant to United States Supreme Court Rule 44.2. On September 18, 2008, Delgado filed his Petition for Writ of Certiorari. The Petition sought to appeal the decision of the United States Court of Appeals for the Seventh Circuit, which affirmed the United States District Court for the Northern District of Illinois' decision to grant Certified Grocers Midwest's ("Certified") Motion for Summary Judgment. The District Court held, and the Court of Appeals affirmed, that Delgado was not disabled in the major life activity of working under the Americans With Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101-12213.

On November 10, 2008, this Court denied Delgado's Petition for Writ of Certiorari. At the time of the denial, Delgado was literally one day away from filing a supplement to his Petition for Writ of Certiorari. It was Delgado's intention to bring this Court's attention to the passage of the ADA Amendments Act of 2008 ("ADAAA"), PL 110-325, which Congress passed after Delgado filed his Petition for Writ of Certiorari. The passage of the ADAAA is an intervening circumstance of such a substantial and controlling effect that it is necessary for this Court to reconsider its denial of Delgado's Petition for Writ of Certiorari.

The ADAAA was signed by President George W. Bush on September 25, 2008, and becomes effective on January 1, 2009. A copy of the ADAAA is attached as part of the Appendix to this Petition for Reconsideration.

The ADAAA has significantly altered the ADA and overturns much of the case law regarding the ADA. The passage of the ADAAA justifies this Court reconsidering its November 10, 2008 decision and also justifies this Court reversing the decision of the United States Court of Appeals for the Seventh Circuit, or in the alternative, remanding this case to the Court of Appeals for consideration of this case under the new standards articulated by the ADAAA.

As previously argued in Delgado's Petition, under the current ADA jurisprudence, plaintiffs, such as Delgado, are often forced to give full attention almost exclusively on whether or not they have an "impairment" that "substantially limits a major life activity." In doing so, plaintiffs are necessarily deflected from focusing on the primary evil intended to be remedied by the ADA: an employer's discrimination. Also, the decisions of the lower courts have made it nearly impossible for individuals to establish that they fall within the "regarded as" prong of the ADA's definition of disability. A combination of these factors create a barrier to plaintiffs seeking judicial relief. As a result, the ADA as the acclaimed protector against employment discrimination has little (if any) force or effect. Through the ADAAA, Congress has changed this.

The ADAAA specifically addresses Delgado's arguments, and resolves them in his favor. Section 2(b)(1) of the ADAAA states that the purpose of the ADAAA "is to carry out the ADA's objectives of providing 'a clear and comprehensive national mandate for the elimination of discrimination' and 'clear, strong, consistent, enforceable standards addressing discrimination' by

reinstating a broad scope of protection to be available under the ADA." Section 2(b)(5) of the ADAAA states that

> it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis.

Section 4 of the ADAAA significantly expands the definition of disability under the ADA. Pursuant to Section 4 of the ADAAA, Section 3(2)(A) of the ADA now identifies "working" as a major life activity. Section 3(4)(A) further provides that the definition of disability in the ADA shall be construed in favor of a "broad coverage of individuals under the ADA, to the maximum extent permitted by terms of the ADA." Now there is no issue that "working" is a major life activity. A barrier removed.

Section 2(b)(3) of the ADAAA rejects the reasoning of *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), in regards to coverage under the third prong, or the "regarded as" prong, of the ADA's definition of disability. In *Sutton*, the Court held that because the plaintiffs, severely myopic twin sisters, only alleged that the defendant "regarded" their poor vision as precluding them from holding the position as a "global airline pilot," as opposed to a broad class of jobs, the plaintiffs failed to adequately allege that their poor eyesight is "regarded as" an impairment that substantially limits them in the major activity of working. *Id.* at 493.

Pursuant to Section 4 of the ADAAA, Section 3(3)(A) of the ADA now states that an individual meets the requirements of "being regarded as having such an impairment" if the individual "establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." Section 3(3)(A) rejects the reasoning of *Sutton* in regards to the third prong, or the "regarded as" prong, of the definition of disability.

Both the District Court's and Court of Appeals' decisions in this case ruled that Delgado had not met his burden for the "regarded as" prong because he did not show that Certified pursuant to the ADAAA, "regarded" him as disabled for a broad range of jobs. Section 3(3)(A) of the ADA now removes this requirement in stating that the "regarded as" prong does not require a showing that an individual is or is perceived to be limited in a major life activity.

Section 3(b)(4) of the ADAAA also conveys the Congressional belief that the standard created by the Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), for "substantially limits" and applied by lower courts has created an inappropriately high level of limitation necessary to obtain coverage under the ADA. The *Toyota Motor* Court held that the terms "substantially" and "major" in the definition of disability under the ADA need to be interpreted strictly to create a demanding standard. *Id.* at 197. The Court also stated in *Toyota Motor* that to be substantially limited in performing a major life activity under the ADA, an individual must have an

impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. *Id.* at 198.

In this case, the District Court cited *Toyota Motor* extensively for the proposition that for a disability to be recognized as such, the disability must "substantially limit" a major life activity. According to the District Court, this is a "demanding standard," which Delgado could not meet. Thus, the District Court found that Delgado was not substantially limited in the major life activity of working. Through the ADAAA, Congress has rejected the "substantially limits" standard utilized by the District Court and Court of Appeals in this case. Now there is a barrier lowered to disabled plaintiffs seeking to establish that they are in fact disabled.

The ADAAA expressly resolves the primary arguments of Delgado's Petition in his favor, specifically that the ADA jurisprudence (prior to the ADAAA) is so demanding that it is almost impossible for a plaintiff to succeed with his or her claim under the ADA. Congress has emphatically signaled its belief that the extra high standards articulated by courts are contrary to Congressional intent. Throughout the ADAAA, Congress continually reaffirms its intent that the question of whether an individual's impairment is a disability under the ADA *should not* demand extensive analysis, which was exactly the type of analysis undertaken by the District Court and the Court of Appeals in this case. The ADAAA has altered the jurisprudence of the ADA, and there presumably are now significantly relaxed standards and burdens of proof for which a plaintiff must show to prove he or she was disabled.

The ADAAA should be applied retroactively to this case. Section 2(b)(1) provides that Congress' intention in passing the ADAAA was to carry out the original objective of the ADA, elimination of discrimination, by *reinstating* a broad scope of protection to be available under the ADA. The fact the Congress used the word "reinstating" suggests that Congress intended the ADAAA to apply retroactively. Further, applying the ADAAA in this case would not affect any substantive right, liability, or duty of Certified on the basis of conduct arising before enactment of the ADAAA. *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). Under the ADA, Certified always had a duty not to discriminate on the basis of Delgado's disability, and the ADAAA has only reinstated the orginal purpose of the ADA by removing the demanding standards imposed by the courts.

The passage of the ADAAA is an intervening circumstance of such substantial and controlling nature that it justifies this Court reconsidering its November 10, 2008 decision. The ADAAA also justifies this Court reversing the decision of the United States Court of Appeals for the Seventh Circuit, or in the alternative, remanding this case to the Court of Appeals for consideration of this case under the new standards articulated by the ADAAA.

CONCLUSION

Based on the above and forgoing, this Court should reconsider its November 10, 2008 decision and grant Delgado's Petition for a Writ of Certiorari. In addition to the reasons set forth in Delgado's Petition for Writ of Certiorari, the passage of the ADAAA justifies this Court reversing the decision of the United States Court of Appeals for the Seventh Circuit. In the alternative, passage of the ADAAA justifies this Court remanding this case to the United States Court of Appeals for the Seventh Circuit for consideration of this case pursuant to the new standards articulated in the ADAAA.

Respectfully submitted,

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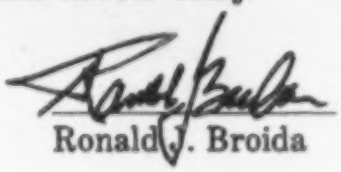
CERTIFICATE OF GOOD FAITH

The undersigned hereby certifies that this petition for rehearing is restricted to the grounds specified in Rule 44.2 of the Rules of the Supreme Court and is presented in good faith and not for delay.



Ronald J. Broida

APPENDIX

S. 3406

ONE HUNDRED TENTH CONGRESS OF THE UNITED STATES OF AMERICA

AT THE SECOND SESSION

Begun and held at the City of Washington on Thursday, the third day of January, two thousand and eight

An Act

To restore the intent and protections of the Americans with Disabilities Act of 1990.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "ADA Amendments Act of 2008".

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—Congress finds that—

(1) in enacting the Americans with Disabilities Act of 1990 (ADA), Congress intended that the Act "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and provide broad coverage;

(2) in enacting the ADA, Congress recognized that physical and mental disabilities in no way diminish a person's right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers;

(3) while Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled;

(4) the holdings of the Supreme Court in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect;

(5) the holding of the Supreme Court in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) further narrowed the broad scope of protection intended to be afforded by the ADA;

(6) as a result of these Supreme Court cases, lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities;

(7) in particular, the Supreme Court, in the case of Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002), interpreted the term "substantially limits" to require a greater degree of limitation than was intended by Congress; and

(8) Congress finds that the current Equal Employment Opportunity Commission ADA regulations defining the term "substantially limits" as "significantly restricted" are inconsistent with congressional intent, by expressing too high a standard.

(b) PURPOSES.—The purposes of this Act are—

(1) to carry out the ADA's objectives of providing "a clear and comprehensive national mandate for the elimination of discrimination" and "clear, strong, consistent, enforceable standards addressing discrimination" by reinstating a broad scope of protection to be available under the ADA;

(2) to reject the requirement enunciated by the Supreme Court in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures;

(3) to reject the Supreme Court's reasoning in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of

the Supreme Court in School Board of Nassau County v. Arline, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973;

(4) to reject the standards enunciated by the Supreme Court in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002), that the terms "substantially" and "major" in the definition of disability under the ADA "need to be interpreted strictly to create a demanding standard for qualifying as disabled," and that to be substantially limited in performing a major life activity under the ADA "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives";

(5) to convey congressional intent that the standard created by the Supreme Court in the case of Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) for "substantially limits", and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis; and

(6) to express Congress' expectation that the Equal Employment Opportunity Commission will revise that portion of its current regulations that defines the term "substantially limits" as "significantly restricted" to be consistent with this Act, including the amendments made by this Act.

SEC. 3. CODIFIED FINDINGS.

Section 2(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101) is amended—

(1) by amending paragraph (1) to read as follows:

"(1) physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination;";

(2) by striking paragraph (7); and

(3) by redesignating paragraphs (8) and (9) as paragraphs (7) and (8), respectively.

Appendix

SEC. 4. DISABILITY DEFINED AND RULES OF CONSTRUCTION.

(a) DEFINITION OF DISABILITY.—Section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102) is amended to read as follows:

"SEC. 3. DEFINITION OF DISABILITY.

"As used in this Act:

"(1) DISABILITY.—The term 'disability' means, with respect to an individual—

"(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

"(B) a record of such an impairment; or

"(C) being regarded as having such an impairment (as described in paragraph (3)).

"(2) MAJOR LIFE ACTIVITIES.—

"(A) IN GENERAL.—For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

"(B) MAJOR BODILY FUNCTIONS.—For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

"(3) REGARDED AS HAVING SUCH AN IMPAIRMENT.—For purposes of paragraph (1)(C):

"(A) An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

"(B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

"(4) RULES OF CONSTRUCTION REGARDING THE DEFINITION OF DISABILITY.—The definition of 'disability' in paragraph (1) shall be construed in accordance with the following:

"(A) The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.

"(B) The term 'substantially limits' shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.

"(C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

"(D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

"(E)(i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as—

"(I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

"(II) use of assistive technology;

"(III) reasonable accommodations or auxiliary aids or services; or

"(IV) learned behavioral or adaptive neurological modifications.

"(ii) The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

"(iii) As used in this subparagraph—

"(I) the term 'ordinary eyeglasses or contact lenses' means lenses that are intended to fully correct visual acuity or eliminate refractive error; and

"(II) the term 'low-vision devices' means devices that magnify, enhance, or otherwise augment a visual image.".

(b) CONFORMING AMENDMENT—The Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.) is further amended by adding after section 3 the following:

"SEC. 4. ADDITIONAL DEFINITIONS.

"As used in this Act:

"(1) AUXILIARY AIDS AND SERVICES.—The term 'auxiliary aids and services' includes—

"(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

"(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

"(C) acquisition or modification of equipment or devices; and

"(D) other similar services and actions.

"(2) STATE.—The term 'State' means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands of the United States, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.".

(c) AMENDMENT TO THE TABLE OF CONTENTS.—The table of contents contained in section 1(b) of the Americans with Disabilities Act of 1990 is amended by striking the item relating to section 3 and inserting the following items:

"Sec. 3. Definition of disability.

"Sec. 4. Additional definitions.".

SEC. 5. DISCRIMINATION ON THE BASIS OF DISABILITY.

(a) ON THE BASIS OF DISABILITY.—Section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112) is amended—

(1) in subsection (a), by striking "with a disability because of the disability of such individual" and inserting "on the basis of disability"; and

(2) in subsection (b) in the matter preceding paragraph (1), by striking "discriminate" and inserting "discriminate against a qualified individual on the basis of disability".

(b) QUALIFICATION STANDARDS AND TESTS RELATED TO UNCORRECTED VISION.—Section 103 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12113) is amended by redesignating subsections (c) and (d) as subsections (d) and (e), respectively, and inserting after subsection (b) the following new subsection:

"(c) QUALIFICATION STANDARDS AND TESTS RELATED TO UNCORRECTED VISION.—Notwithstanding section 3(4)(E)(ii), a covered entity shall not use qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and consistent with business necessity.".

(c) CONFORMING AMENDMENTS.—

(1) Section 101(8) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111(8)) is amended—

(A) in the paragraph heading, by striking "WITH A DISABILITY"; and

(B) by striking "with a disability" after "individual" both places it appears.

(2) Section 104(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12114(a)) is amended by striking "the term 'qualified individual with a disability' shall" and inserting "a qualified individual with a disability shall".

SEC. 6. RULES OF CONSTRUCTION.

(a) Title V of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201 et seq.) is amended—

(1) by adding at the end of section 501 the following:

"(e) BENEFITS UNDER STATE WORKER'S COMPENSATION LAWS.—Nothing in this Act alters the standards for determining eligibility for benefits under State worker's compensation laws or under State and Federal disability benefit programs.

"(f) FUNDAMENTAL ALTERATION.—Nothing in this Act alters the provision of section 302(b)(2)(A)(ii), specifying that reasonable modifications in policies, practices, or procedures shall be required, unless an entity can demonstrate that making such modifications in policies, practices, or procedures, including academic requirements in postsecondary education, would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations involved.

"(g) CLAIMS OF NO DISABILITY.—Nothing in this Act shall provide the basis for a claim by an individual without a disability that the individual was subject to discrimination because of the individual's lack of disability.

"(h) REASONABLE ACCOMMODATIONS AND MODIFICATIONS.—A covered entity under title I, a public entity under title II, and any person who owns, leases (or leases to), or operates a place of public accommodation under title III, need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets the definition of disability in section 3(1) solely under subparagraph (C) of such section.";

(2) by redesignating section 506 through 514 as sections 507 through 515, respectively, and adding after section 505 the following:

SEC. 506. RULE OF CONSTRUCTION REGARDING REGULATORY AUTHORITY.

"The authority to issue regulations granted to the Equal Employment Opportunity Commission, the Attorney General, and the Secretary of Transportation under this Act includes the authority to issue regulations implementing the definitions of disability in section 3 (including rules of construction) and the definitions in section 4, consistent with the ADA Amendments Act of 2008."; and

(3) in section 511 (as redesignated by paragraph (2)) (42 U.S.C. 12211), in subsection (c), by striking "511(b)(3)" and inserting "512(b)(3)".

(b) The table of contents contained in section 1(b) of the Americans with Disabilities Act of 1990 is amended by redesignating the items relating to sections 506 through 514 as the items relating to sections 507 through 515, respectively, and by inserting after the item relating to section 505 the following new item:

"Sec. 506. Rule of construction regarding regulatory authority.".

SEC. 7. CONFORMING AMENDMENTS.

Section 7 of the Rehabilitation Act of 1973 (29 U.S.C. 705) is amended—

(1) in paragraph (9)(B), by striking "a physical" and all that follows through "major life activities", and inserting "the meaning given it in section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102)"; and

(2) in paragraph (20)(B), by striking "any person who" and all that follows through the period at the end, and inserting "any person who has a disability as defined in section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102).".

SEC. 8. EFFECTIVE DATE.

This Act and the amendments made by this Act shall become effective on January 1, 2009.

Speaker of the House of Representatives.

Vice President of the United States and President of the Senate.